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Attorneys For Defendant WINDY N. HARVEY

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA,

No. CR 08-405 KI

Plaintiff,

vs.

**DEFENDANT'S SECOND
MOTION TO COMPEL
DISCOVERY**

WINDY N. HARVEY,

Defendant.

COMES NOW Defendant Windy N. Harvey, through his attorney Robert Reid, and hereby moves the Court to compel the government to produce the evidence or information set forth below. Generally, this motion pertains to Brady material, information about the government's informant Freddie Victor Tamayo, and F.R.E. 404(b) material pertaining to the defendant.

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ITEMS SOUGHT

(1)(a) Informant Tamayo Evidence: All information about Freddie Victor Tamayo within the possession of the United States Attorney's office or agencies involved in the prosecution of Freddie Victor Tamayo in the District of Oregon (case number CR 04-30013-AA) or any other cases known to the government, including (a) his cooperation agreements; (b) information about any criminal activity involving Mr. Tamayo known to the government which was not charged; (c) payments to Mr. Tamayo during the pendency of his cases or cooperation period; (d) the current status of the cooperation agreement and post-sentencing activity relating to those agreements; (e) his prior record or criminal activity charged, whether resulting in conviction or not; (f) interview reports conducted by agencies involved in the investigation or prosecution of Mr. Tamayo prior to, or during, his cooperation period relating to that cooperation; (g) Mr. Tamayo's presentence report in District of Oregon case number CR 04-30013-AA.¹

(1)(b) Specific request that affirmative inquiry be established on record:

It is specifically requested and moved that (a) the Court require the prosecution to make affirmative inquiry, as to the existence of this Brady material, to the investigating agencies involved in the prosecution of Mr. Tamayo in the District of Oregon, and that (b) the prosecution be required to report to the Court the details of that inquiry including what was requested and who the request was made to. This

¹ A defendant is entitled to material in a probation file that bears on the credibility of a significant witness in the case. United States v. Strifler, 851 F.2d 1197, 1201 (9th Cir. 1988) (citing Brady v. Maryland, 373 U.S. at 87 at 1207). The defense would agree to an *in camera* review of the PSR by the Court.

portion of the motion is necessary because the United States Attorney's Office in this District has demonstrated, in past cases, either a lack of knowledge or a disregard of its obligations under Brady v. Maryland, and under Kyles v. Whitley, 514 U.S. 419 (1995), specifically as to its obligation to make affirmative inquiry into the existence of Brady material. *See: United States v. Price*, 566 F.3d 900 (9th Cir. 2009).

(1)(c) Previous requests: The Brady material in (1)(a), above, has been requested several times, formally by motion and letter, informally in emails, and orally; each time it has been promised. Time is running out for the defense to be able to effectively utilize this material in trial preparation. In order to respond to Brady information through effective and constitutionally required defense investigation, we need this information now.

* * * * *

(2) Informant Tamayo's institutional records for FDC Sheridan, including administrative decisions as to where he was housed: Mr. Tamayo is an experienced informant, having "cooperated" himself into what appears from records (independently obtained) to be non-prosecution in certain cases, and greatly reduced sentences in others. In his recent District of Oregon case, he "cooperated" his way out of a 20-year mandatory minimum sentence to a sentence of only a few months in prison, despite a plea agreement which specified that he was subject to a ten-year mandatory minimum sentence (he was not safety-valve eligible). A few months was too long for Mr. Tamayo, however, who desired immediate release rather than to wait a few additional months, so he "cooperated"² against Mr. Harvey after

² The term "cooperation" is used loosely here to include the provision of what may appear to be useful information, without regard for its truthfulness.

being celled with him. Information available to the defense shows that Mr. Tamayo was locked-down in segregation due to punishment for a fight, but then was released from segregation and celled with Mr. Harvey. Given Mr. Tamayo's history of availing himself of opportunities to better his own circumstances through "cooperation" against others, this constitutes a *prima facie* evidence that Mr. Tamayo intended in advance to cooperate against Mr. Harvey. Whether this intention was known only to Mr. Tamayo, or whether it was shared with prison administrators -- or even with the prosecution -- the information is still Brady evidence. The government used Mr. Tamayo as an informant in the case in which he was serving his sentence, and it has used him as an informant in this case; it cannot now disassociate itself from his actions by a claim of ignorance. Sherman v. United States, 356 U.S. 369, 375 (1958).

* * * * *

(3)(a) F.R.E. 404(b) evidence as to the defendant: The defense requests, and moves, that any "other act" evidence which the government intends to introduce against Mr. Harvey be provided to the defense, (i.e., evidence which is not directly part of the contemporaneous charged conduct). F.R.E. 404(b) provides that the prosecution shall provide "reasonable notice in advance of trial" of such evidence.

(3)(b) Previous requests: This material has, as well, been requested formally in motions and letters, informally in emails, and orally. The government informed Mr. Harvey's previous attorney by letter of August 22, 2009, that it would provide the material, and has likewise promised it to current counsel each time it was requested. Again, time is running out for the defense to be able to effectively respond to any such evidence through defense investigation should further delays result.

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(4) Criminal record of government witnesses: The defense further requests that Brady evidence, including the criminal record of any witnesses it intends to call, be provided sufficiently in advance of trial as to allow the defendant sufficient time to devote its limited investigative resources to develop such evidence effectively.

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RESPECTFULLY SUBMITTED this 14th of July, 2011.

S/ Robert Reid (electronic signature intended as original)

Robert Reid (OSB #81434)
Attorney for Defendant Windy N. Harvey
OSB #81434

Served on all parties electronically on the 14th day of July, 2011, through the PACER-ECF document filing system of the United States District Court for the District of Oregon